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No. 75-405

In the Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL COMMISSION ON EGG NUTRITION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL TRADE COMMISSION

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Petitioner has called to the Court's attention the recent decision of the Ninth Circuit in *Federal Trade Commission* v. *Simeon Management Corp.*, No. 75-2363, decided March 2, 1976. We are filing this supplemental memorandum, pursuant to Rule 24(5) of this Court's Rules, to discuss the bearing of the *Simeon* decision on the petition for a writ of certiorari in this case.

The Ninth Circuit in *Simeon* affirmed a district court's denial of a temporary injunction against the dissemination by a group of weight-reduction clinics of allegedly false advertisements that induced the purchase of drugs. The court of appeals held that "a 'reasonable belief' on the part of the FTC [that the advertisements are false] is insufficient to constitute a 'proper showing' " under 15 U.S.C. 53(a) for the granting of injunctive relief pending the completion of administrative cease-and-desist proceedings

(slip op. 5). The court of appeals ruled that the district court was required "independently to determine whether an injunction would be in the public interest" and that "[t]he court must base this determination on the likelihood that the FTC will succeed on the merits in proceedings for a final cease-and-desist order and on the balance of equities" (slip op. 6-7).

That ruling conflicts with the holding of the court of appeals in the present case that, under 15 U.S.C. 53(a), the Commission is *not* required "to justify its request for an injunction on the basis of a balancing of the equities and the likelihood of ultimate success" (Pet. App. 5a). Under the Seventh Circuit's decision—which we believe to be correct—a temporary injunction should be granted upon a showing by the Commission that it has reason to believe both that the advertisements are false and that "an injunction would be in the best interest of the public" (*ibid.*).

Although the courts of appeals are in disagreement over the proper construction of 15 U.S.C. 53(a), the results in the two cases are not necessarily inconsistent. The Ninth Circuit's opinion in *Simeon*, for example, suggests that the panel might have reached the same result even if it had applied the Seventh Circuit's standard. The discussion in *Simeon* of the Commission's likelihood of success on the merits (slip op. 7-11) is consistent with a view that the Commission failed in that case to make even the showing of reasonable belief required by the Seventh Circuit in the present case. Similarly, the Seventh Circuit in this case found not only that the Commission had a reasonable belief in the falsity of petitioner's advertisements, but also that the advertisements were in fact "false and misleading" (Pet. App. 6a). Compare *Simeon* slip op. 8-9, 11.

In any event, the disagreement between these two courts need not be resolved by this Court at the present time.

The statutory issue arises infrequently. Since 1973, when Section 53 was amended to add subsection (b) (see Pet. App. 4a-5a), the Commission has instituted only four temporary injunction actions under Section 53(a), including the present case and *Simeon*. The Commission has accordingly concluded that the apparent differences between the Seventh and Ninth Circuits probably will not significantly impede its administration of the Federal Trade Commission Act, and it has therefore determined not to seek certiorari in *Simeon*.

If the existing conflict persists, and if the issue becomes more important, future opportunities for resolving the conflict will almost surely be presented. We do not believe that plenary review is required in the present circumstances.

For the reasons stated in this memorandum and in our initial brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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